In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1124

UNITED STATES OF AMERICA

v.

W. M. WEBB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Although the substantive arguments made in the respondents' brief in opposition are adequately dealt with in the petition, we file this reply brief to discuss and to clarify one point of fact. This is prompted by the assertion in the brief in opposition (p. 2, n. 1) that there is a "material distortion in petitioner's statement * * * (Pet. 4): 'The captain could be fired if he failed to follow a respondent's instructions (R. 224).'"

The record reference is to finding 13 of the district court (R. 224):

> The arrangement between the plaintiffs and each captain was entirely oral. The term of the arrangement was not specified, but it was

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understood to persist for a fishing season. It could be terminated by either party, voluntarily or involuntarily, at the conclusion of any trip during a season. This could occur only when a boat was in port and before another fishing trip was commenced. While the arrangement could be so terminated, custom and practice was for it to be continued for the season.

This finding is supported by paragraphs 58–62 and 86–87 of the stipulation of fact entered into between the parties (R. 214, 218):

58. Any individual selected as captain would be one in whose honesty and integrity plaintiffs had confidence.

59. In addition to the confidence reposed above, the plaintiffs expected a captain to be able to—

(*a*) operate the boat;

(*b*) conduct the fishing operations, and

(c) select and get along with the crew he selected.

60. The arrangement between the plaintiffs and each captain was entirely oral.

61. It could be terminated voluntarily or involuntarily, although in practice this occurred only at times when a boat was in port.

62. While the arrangement could be terminated at any time, custom and practice was for it to be continued over an extended period of time for each boat and for more than one trip.

* * * * *

86. When a captain's action aboard a boat was such as to endanger the lives of the personnel or damage property, the plaintiffs would refuse to let him take the boat out again and sever relations with him.

87. The plaintiffs would sometimes terminate a relationship with a captain who was unable to produce adequate catches of menhaden.

It is also supported by the following excerpt from the testimony of Jack T. Styron, an executive of Wallace Menhaden Productions, one of the respondents here (R. 41, 42, 43–44):

Q. Is it indicated to the captain by the owner that as long as his performance is satisfactory, he will fish the boat for that season?

A. Right.

Q. Is it also understood that he can be terminated at the end of any day's work, so to speak, if his performance is not satisfactory?

A. That is correct.

* * * * *

Q. Well, will the boat owner sometimes terminate a captain because of a failure to produce adequately?

A. Oh, yes.

* * * * *

Q. What other reasons for a captain's termination have occurred other than an inability to produce at an adequate level?

A. Health.

Q. Have you had disciplinary problems to cause termination of a particular captain?

A. Not particularly.

Q. Do you recall any other specific reasons for what I will call "involuntary termination," where the captain wanted to continue and you said, "No, I am taking the boat away from you," other than an inability to produce?

A. I can't recall of any instance where the man—we have been lucky that the caliber of

> the captains has been such that they didn't get in jail or weren't accused of raping somebody or something, but that has been a factor in some instances in our competitors' operations. It is something that could be terminated [58] tonight if the owner of the vessel felt that the captain wasn't best suited. He could call the captain in and say, "Listen, I don't think that you are performing properly and you are not producing. You bring the papers to the office, and that is the end of the operation." By the same token, the captain can call in and say, "I am bringing the papers in, I don't want any more of this." It is kind of a loose way of doing things, but that is the way it is done.

Thus it is clear that the captain could be fired at the end of any voyage, with or without cause. The practical test was the captain's performance, and the criterion was the satisfaction and judgment of the owner as to the captain's ability to perform in accordance with the owner's wishes. In short, the relationship was no different than that between any employer and his supervisory personnel.

Respectfully submitted.

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Solicitor General.

APRIL 1969.

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